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FRENCH "*FIDUCIE*" AND RUSSIAN "*ДОВЕРИТЕЛЬНОЕ УПРАВЛЕНИЕ ИМУЩЕСТВОМ*" (TERMINOLOGICAL PECULIARITIES)

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Abstract

"Trust" is "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence". This universal institution appeared in the Medieval English law and has become very popular during the last decades. Different variations of a trust mechanism have emerged in some world countries. The given paper tries to answer the demands of the modern epoch via making a precise description of the French and Russian trust-like devices. It makes an in-depth analysis, singles out major terminological units and underlines the fact, that the newly-established French and Russian mechanisms have to undergo several stages for turning into faithful reflections of the Anglo-American model of "trust".

Keywords: Estate trust management, fiducie, patrimoine d'affectation, patrimony, trust

Introduction

"Trust" is "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence"[47] (F. W. Maitland). It "is undoubtedly an extremely versatile instrument which is suitable for a great variety of purposes, even leading some commentators to qualify it as a "universal fix-it"[48]. The roots of trust-like devices can be seen in Roman law of the 1st-3rd centuries A.D.: the Roman citizen (a *principle)* could transfer property to a "*fiduciary* on the basis of a certain condition (*fidei fiduciae causa*), which obliged him (her) to use the property in accordance with the terms of the contract and to return it immediately after the emergence of the conditions specified in the contract"[49]. The original form of the institution of "trust" appeared later – in common law of the Middle Ages. However, contemporary law seems quite remote from that – Medieval - practice. Nowadays, a "trust" is defined as a juridical agreement under which a "settler" ("grantor") transfers the property to a "trustee", who has to exercise and manage it for the benefit of a "beneficiary" – an equitable and a beneficial owner of the property. For several centuries the institution of "trust" was considered as a sole possession of the Common law. However, a significant phenomenon has occurred throughout the world during the last decades. Trust-like devices have been appearing in Civil law jurisdictions at an increasing rate.

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The given paper is dedicated to the precise description of the French and Russian trust-like instruments. It makes an in-depth analysis, singles out major terminological units and underlines the fact, that the newly-established French and Russian mechanisms have to undergo several stages for turning into faithful reflections of the original model of "trust".

The French "Fiducie"

Conventionally, the biggest feature of a trust was the "separation between the trustee's common-law power and the beneficiary's equity power. For this reason, civil law countries were unable to adopt a legal structure in which common-law power and equity power belong to separate entities"[50]. Despite this fact, in the recent years, trust-like devices have been introduced in certain legal systems of Europe. The major purpose of the rapid implementation of these institutions was the perspective of increasing the international competitiveness of European countries via the promotion of economic activities carried out with the use of "trust".

"On 7 February 2007 the French Parliament adopted a new law instituting the "fiducie" as a creature of the French legal system. On 19 February 2007, President Jacques Chirac promulgated this new law: the fiducie proudly left the quotation marks, and became a reality"[51]. This tailor-made institution drew upon "the Roman concept of fiducia and the experience of analogue institutions from other civil law jurisdictions such as Luxembourg, but also from the common law trust"[52]. Article 2011 of the newly adopted law defined "*fiducie*" as: "a transaction by which one or several settlers transfer assets, rights or security interests, or a totality of assets or of security interests, present or future, to one or several fiduciaries who by maintaining them separately from their own patrimony, act in furtherance of a determined objective to the benefit of one or several beneficiaries"[53]. The given definition clearly indicates to the main elements of trust relationships:

- Settler ***(constituant)*** – a legal entity, which creates a trust.
- Trustee ***(fiduciaire)*** – a restricted concept of the French law, which comprises credit institutions, insurance companies and advocates (including English solicitors and barristers, but not notaries). Fiduciaries have many rights and responsibilities. They vary from trust to trust depending on their type. Hence, they can be removed if the interests of beneficiaries are in danger.
- ***beneficiaries (bénéficiaires)*** – it's a well-known fact, that "a fiducie is null and void if it is created with the sole intention of benefiting the beneficiary"[54]. Despite this fact a concept of beneficiary exists. Moreover, "the ***constituant*** or the ***fiduciaire*** may be the beneficiary or one of the beneficiaries of a contract of fiducie"[55].

The law of 2007 was followed by the Law of 4 August 2008 and an order of 30 January of 2009, which brought some innovations in the world of the French "fiducie". Therefore, nowadays, a settler is represented by a natural person or a legal entity, a lawyer

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(***avicat***) is included in the list of possible fiduciaries and the maximum duration of "fiducie" is 99 years (instead of previously existed 33 years). It should also be noted, that "in France and Luxemburg the core of the concept of trust is *patrimony*"[56]. Prof. H. Watanabe characterizes "patrimony" as a counterpart of the French "*patrimoine*" and gives the following description:

"Patrimony is a concept that represents the aggregate of an individual's property (the sum of his/her assets and liabilities). Every individual … cannot have more than one patrimony. However, the beneficiary of a trust has a *special patrimony* which is segregated and independent from his/her patrimony in general terms. Such special patrimony is a trust property"[57].

It's worth mentioning, that the French legal reality does not present the term "patrimoine special". Hence, it distinguishes the term "*patrimoine d'affectation*", which "refers to the idea central to the contract of the fiducie, that a new patrimony has been created which is entirely separate both from that of its creator (the *constituant*) and from that of its owner (the *fiduciaire*) and is instead to be dedicated to (*affecté*) the purposes or persons who are the objects of the contract of fiducie"[58]. The scholars present different translations of the phrase "*patrimoine d'affectation*"/"*patrimoine d'affectation autonome*", for instance, J. Koessler believes, that it means "an autonomous estate by appropriation"[59], while P. Matthews indicates, that it ought to be nominated as a "dedicated fund"[60]. We think, that "*patrimoine d'affectation*" must be translated as "estate by appropriation", because, terminologically, the English word "*appropriation*" corresponds to the French term "*affectation*".

Therefore, nowadays, "*fiducie*" can be regarded as a contract by which a natural person or a legal entity transfers assets to "***fiduciaire"***, who holds and manages it for the benefit of one or more beneficiaries. This process can be called "a transfer for purpose", which causes losing of *constituant*'s ownership rights and acquisition of a contractual right. Specific emphasis must be put on the fact, that "*fiducie*" stipulates the emergence of several important changes in the French legal reality:

1. it brings to the end the idea established by the Revolution of 1789, which indicates, that the ownership of property cannot be divided into various rights.
2. it facilitates the isolation of assets in an autonomous entity, which is kept separately from the estate of "*constituant*" i.e. the segregation of assets takes place;
3. it stipulates a temporary transfer of the property.

It's worth mentioning, that the French legal reality presents three types of "*fiducie*": "*fiducie-sûreté*", "*fiducie-gestion*" (management fiducie) and "*fiducie-libéralité*". "The first one is applied for purpose of securing the performance of an obligation. The second one is an instrument of syndicated loans management"[61], while "in the fiducie-libéralité [fiduciary gift], the transfer of ownership is driven by the will of the settler to grant rights to a third-party by the intermediary of the fiduciary, who, in turn, will transfer to the third-party, donor

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or legatee, the assets which he shall have received"[62]. It's worth mentioning, that in case of a "*fiducie-gestion*" "the wealth remains with the settler; in case of the fiducie-libéralité, it passes to the beneficiary; in case of the fiducie-sûreté, it is the beneficiary who is enriched by its amount, and not the fiduciary ownership which of course helps to ensure the payment of the debt but without adding any supplemental wealth"[63].

Therefore, the innovative French institution "*fiducie*" can be treated as a trust-like device, which shares some characteristics of Anglo-American "trust", but differs from it. Moreover, the terminological study of the word "*fiducie*" enables us to suppose, that it derived from the Latin word "*fiducia"*, which means "an act based on trust"[64].

The Russian "Доверительное управление имуществом"

In 1993 Russia faced an attempt of implementation of the Anglo-American "trust" in its legal system. However, this attempt failed. The "trust" seemed alien to the civil law jurisdiction. Hence, it facilitated the formation of the "estate trust management" ("*доверительное управление имуществом"*) – a new institution of the Russian law.

Similarly to Common law "trust", the contract of the "estate trust management" is created by two parties: an owner of the property and a manager of the property. Under this contract "one party ("*учредитель управления*") entrusts the administration of ownership to the other party ("*доверительный управляющий"*) for a definite period of time, while the other party undertakes a commitment to administer it in the interest of "*учредитель управления*" or the person indicated by him/her ("*выгодоприобретатель"*)"[65]. The main elements of trusted relationships can be presented in the following way:

- "***Учредитель управления"*** – an owner of the property or another person specified by Article 1026 of the Civil Code of the Russian Federation.
- "***Доверительный управляющий"*** – an individual enterpreneur (*индивидуальный предприниматель*) or a commercial organization (*коммерческая организация*) (excluding an unitary enterprise). "In cases, when the entrustment is exercised on the statutory grounds, an administrator can be presented by a citizen (who is not an entrepreneur) or by a nonprofit organization, with the exception of an institution"[66].
- "***Выгодоприобретатель***" – can be presented by "*учредитель управления*" or a person indicated by him/her. A trusted administrator cannot function as a "*выгодоприобретатель"*.

The contract of the "estate trust management" must be concluded for a term, which does not exceed five years. If at the end of the term, the parties do not make the statement of termination of a contract, it will be deemed to be prolonged for the same period of time (for 5 years). In cases of the entrustment of certain types of ownership, the law may provide for other maximum terms of the conclusion of a contract.

Generally, the contract of the "estate trust management" must be created in a written form. It's worth mentioning, that "the transfer of ownership in trust does not involve the assignment of the right of ownership to the trusted administrator"[67]. All the transactions of

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entrausted property are made by "*учредитель управления*", who acts as a principl, but specifies, that performs the functions of an administrator. In cases of written transactions, the abbreviation *"Д.У."* (an abbreviated form of the word-combination *"доверительный управляющий"*) must be written after the administrator's name. Therefore, in contrast to the institution of "trust", "the contract of the estate trust management" (*"Договор доверительного управления имуществом")* does not present the right of ownership in a "split" form. It considers a mere delegation of authorities. Contractual actions are carried out by "*учредитель управления*", who has no legal rights of property. It's worth mentioning, that the principles of the "estate trust management" have recently emerged even in Russia's banking activities and are regulated by the contemporary Russian Law on functioning of banks.

Therefore, the innovative Russian institution "*доверительное управление имуществом"* can be treated as a trust-like device, which shares some characteristics of Anglo-American "trust", but significantly differs from it. Moreover, the terminological study of the word-combination "*доверительное управление"* reveals its direct connection with the institution of "trust" - it derived from the word "*доверие"* (the Russian equivalent of the term "trust").

Conclusion

All the above mentioned enables us to draw the following conclusions:

- Similarly to the Anglo-American "trust", the Russian "*доверительное управление имуществом"*and French "*fiducie"* are based on "confidence". The word-combination "*доверительное управление"* derived from the word "*доверие"* (the Russian equivalent of the term "trust"), while the word "*fiducie*" can be a derivative of the Latin word "*fiducia"*, which means "an act based on trust";
- Similarly to the Anglo-American "trust", the Russian "estate trust management" consists of three major elements: the owner of the property ("*учредитель управления*"), the administrator (*"доверительный управляющий"*) and the beneficial owner of the property ("*выгодоприобретатель"*). The same can be said about the French "*fiducie"*. However, in contrast to the "estate trust management", "*fiducie"* is null and void if it is created with the sole intention of benefiting the beneficiary;
- The creation of the Anglo-American "trust" requires a trustor's intent presented orally or in a written form, while during the creation of "*fiducie"* or "*доверительное управление имуществом"*, an owner of the property enters into a written contract with a trusted person or legal entity. Therefore, the oral forms are excluded by the French and Russian legislations;
- The Anglo-American "trust" is based on the separation between the trustee's common-law power and the beneficiary's equity power, while the French "fiducie" facilitates the isolation of assets in an autonomous entity, which is kept separately from the estate of "*constituant*". The given autonomous entity is denoted by the phrase "*patrimoine d'affectation*"/"*patrimoine d'affectation autonome*", which indicates to the segregation of assets. The Russian law does not present the equivalent of "*patrimoine d'affectation autonome*". "*Доверительное управление имуществом"* does not involve the assignment of the right of ownership to the trusted administrator. It considers a mere delegation of authorities.
- The contemporary French law recognizes the following types of "*fiducie"*: "*fiducie-gestion"*, "*fiducie-libéralité"* and "*fiducie-sûreté"*. The Russian law is not familiar with such categorization of "trust-like" devices.

Therefore, the French and Russian laws have already indirectly allowed mechanisms similar to the Anglo-American "trust". However, it's obvious, that the resulting instruments

do not present a faithful reflection of the original model. Further researches in the field of the development of "trust-like" mechanisms throughout Europe will fulfill the picture of the expansion of the utilization of "trust" and vividly depict the impact of ongoing processes on the legal spheres of different countries of the globe. Therefore, the given study may play an important role in the solution of one of the most urgent problems of today's world.

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